



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 28.07.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.D.AUDIKESSAVALU

W. P. (MD) No. 24832 of 2019
and

W.M.P. (MD) Nos. 21420 and 21421 of 2019

The Commissioner,
Puliyangudi Municipality,
Puliyangudi - 627 855,
Tirunelveli District.

... Petitioner

-vs-

1. Employees' Provident Fund Organisation,
Rep. by its Regional Provident Fund Commissioner - II,
Bhavishya Nidhi Bhavan,
NGO-B Colony, Perumal Puram Post,
Tirunelveli - 627 007.
 2. The Enforcement Officer,
Circle - II,
Employees' Provident Fund Organization,
NGO-B Colony, Perumal Puram Post,
Tirunelveli - 627 007.
 3. The Branch Manager,
Indian Overseas Bank,
Puliyangudi Branch,
Tirunelveli District.
 4. The Commissioner of Municipal Administration,
Ezhilagam,
Annexe VI Floor,
Chepauk,
Chennai - 600 005.
 5. State of Tamil Nadu,
Represented by the Additional Chief Secretary to Government,
Municipal Administration and Water Supply Department,
Secretariat, Fort St. George,
Chennai - 600 009.
- (R4 and R5 are *suo motu* impleaded
vide order dated 28.07.2021)

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records pertaining to the impugned orders passed by the First



Respondent vide proceedings in File No. TN/TNY/ 89229/Enf.I/ Circle.11/2019 dated 14.10.2019 and consequential order in No. TN/TNY/89229/8F/Enf/Circle.11/CD-I/11-1/2019 dated 08.11.2019 and quash the same.

For Petitioner : Mr. M.Rajarajan

For Respondents : Mr. K.Muralishankar,
Standing Counsel (for R1 and R2)

Mr. R.Ragavendran,
Counsel for the Government (for R4 and R5)

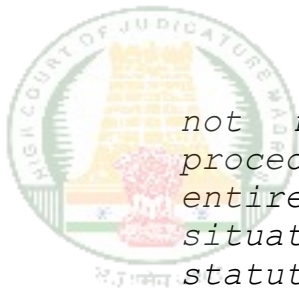
O R D E R
(through video conference)

Heard Mr. M.Rajarajan, Learned Counsel for the Petitioner, Mr. K.Muralishankar, Learned Standing Counsel appearing for the First and Second Respondents and Mr. R.Ragavendran, Learned Counsel appearing for the Fourth and Fifth Respondents and perused the materials placed on record, apart from the pleadings of the parties.

2. The First Respondent by order File No. TN/TNY/89229/ Enf.I/ Circle.11/ 2019 dated 14.10.2019 determined the liability of the Petitioner towards contribution for provident fund dues for the contractual workers engaged for the period from January 2011 to May 2013, under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'Act' for short). The Petitioner was entitled to prefer appeal against that order under Section 7-I of the Act within a period of 60 days from the date of its receipt in terms of Rule 7(2) of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997, before the Appellate Authority, who has been empowered to condone delay in filing such appeal for an extended period of 60 days, if sufficient cause for not preferring appeal within that period is made out. However, the Petitioner did not prefer any such appeal before the Appellate Authority, but has instead filed this Writ Petition on 20.11.2019 challenging the order passed by the First Respondent.

3. It must, at once, be highlighted here that the Hon'ble Supreme Court of India in **Assistant Collector of Central Excise -vs- Dunlop India Limited** [(1985) 1 SCC 260] has explained the legal position relating to the exercise of discretionary powers under writ jurisdiction, in the following words:-

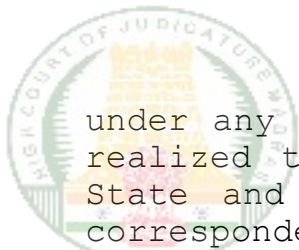
"3.Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is



not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

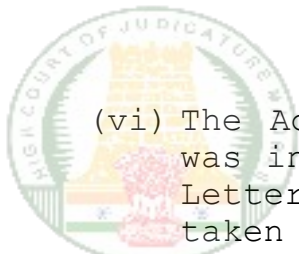
There is no acceptable explanation from the Petitioner for not having resorted to that alternative remedy provided under the statute.

4. The only proposition canvassed by the Petitioner in this Writ Petition impeaching the order in File No. TN/TNY/89229/Enf.I/Circle.11/ 2019 dated 14.10.2019 passed by the First Respondent under Section 7-A of the Act is that it relates to contract labour engaged through contractors by the Petitioner, for whom the Petitioner cannot be fastened liability under the Act. Such contention of the Petitioner is patently misconceived inasmuch as Section 2(f)(1) of the Act defines employees as those who have been employed for wages in any kind of work, manual or otherwise and it does not matter whether that person is employed by or through a contractor. It is not in dispute that exemption under the Act would be available in respect of those employees of the Petitioner to whom the Tamil Nadu Municipal Services Pension Rules, 1970 (hereinafter referred to as the 'TNMSP Rules' for short) applies. At the same, apart from the regular employees, the Petitioner has been entrusting civil works to contractors who have been engaging labour in that regard. It is also not out of place to take judicial notice of the fact that Municipalities like the Petitioner have been engaging manpower through self-help groups and also out sourced their work through contractors who have engaged workers for the same. However, the workers, who have been engaged through these contractors employed by the Petitioner, are not entitled to any benefit under the TNMSP Rules. In this context, it has to be noticed here that the Hon'ble Supreme Court of India in **Pawan Hans Limited -vs- Aviation Karmachari Sanghatana** [(2020) 13 SCC 506] has held that the exemption under Section 16(1)(b) and (c) of the Act cannot be availed when the establishment does not cover all its employees



under any other provident fund scheme. The Government of Tamil Nadu realized this anomaly prevailing in the Municipalities across the State and issued directions to the concerned authorities in the correspondence in that regard, as stated below:-

- (i) The Commissioner of Municipal Administration by Letter No. 57084/ 2011/L3 dated 21.10.2014 addressed to all Commissioners of Municipal Councils has communicated the decision of the State Government that though the Municipalities/Corporations take up works through private Contractors, the authorities concerned should ensure that the Contractors pay the PF subscription of their employees duly to the PF organization, otherwise, the responsibility for the same will be fixed on the concerned Municipalities/Corporations, which is the principal employer, if the Contractors default in this regard.
- (ii) The Government of Tamil Nadu by Letter No.18823/MC5/2016-1, dated 19.08.2016, sent to the Commissioner of Municipal Administration required all the Municipal Councils in the State to comply with the provisions of the Act, to withdraw the Court cases, in addition to share the details of Contractors/contracts awarded by them in the principal employer portal available in the website of Employees Provident Fund Organization to facilitate the extension of social security benefits to all eligible persons.
- (iii) Letter ROC No.1819/2016/L3, dated 19.10.2016, was sent by the Commissioner of Municipal Administration to all Municipal Commissioners to take necessary action in connection with implementation of the EPF Act and the schemes framed thereunder in respect of employees of Municipalities and Corporations and send the report directly to the Employees Provident Fund Organization concerned.
- (iv) The Government of Tamil Nadu in Letter No. 14070/ME.3/2016-4, dated 20.12.2016 sent to the Commissioner of Municipal Administration that the Notification No. S.O. 30(E) dated 08.11.2011 issued by the Central Government shall cover all employees of establishments as per definition of 'employee' under Section 2(f) of the Act excluding the employees who are getting benefits of provident fund and pension according to TNMSP Rules of the State Government or municipal laws, etc., and that the benefits under the Act have to be extended to all eligible employees.
- (v) The Commissioner, Municipal Administration had further sent a Letter Na. Ka. No. 23701/2020/L-1 dated 05.02.2021 to all the Municipal Commissioners reiterating the requirements to comply with the provisions of the Act, including the timely remittance of the contribution deducted from the bills of the contractors as failure to do so, would entail penal consequences.



(vi) The Additional Central Provident Fund Commissioner, Coimbatore was informed by the Commissioner of Municipal Administration by Letter Roc No. 23701/2020/L-1 dated 12.03.2021 of the action taken in that regard.

It also requires to be placed on record that the Ministry of Labour and Employment, Government of India by Letter No. S-35025/15-88-SS-II dated 08.01.1989 sent to the Central Provident Fund Commissioner has issued instructions on similar lines, which is extracted below:-

"(iv) There may be establishments which employ large number of casual/contingent staff who are not entitled to the benefit of provident fund or pension. The casual/contingent staff of such establishment will continue to be covered under the Act, but their regular employees who are entitled to the benefit of provident fund pension should be excluded from the purview of the Act."

It would be useful here to extract from the authoritative pronouncement of the Constitution Bench of the Hon'ble Supreme Court of India in **Sant Ram Sharma -vs- State of Rajasthan** (AIR 1967 SC 1910), which reads as follows:-

"7.It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

Viewed from that perspective, the authorities of the Employees' Provident Fund Organization cannot be found fault for having commenced proceeding under the Act relying on the instructions from the Government for determining the liability of provident fund dues under the Act in respect of the workers and employees in the establishment of the Petitioner for the relevant period, who are not entitled to the benefits under the TNMSP Rules.

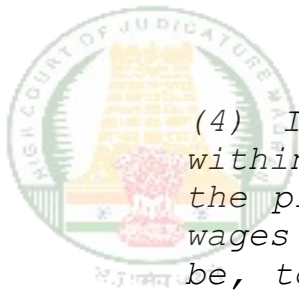
5. It would be relevant here to extract Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, as follows:-

"21. Responsibility for payment of wages.-

(1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every principal employer shall nominate a representative duly authorized by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorized representative of the principal employer.



(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor."

That apart, Rules 25(2)(iv), 71, 72 and 73 of the Tamil Nadu Contract Labour Rules, 1975, provides as follows:-

"25.

(2) Every licence granted under sub-rule (1) or renewed under rule 29 shall be subject to the following conditions, namely:-

....

(iv) the rates of wages payable to the workmen by the contractor shall not be less than the rates prescribed under the Minimum Wages Act, 1948 (11 of 1948), for such employment where applicable and where the rates have been fixed by agreement, settlement or award, not less than the rates so fixed;

....

71. A notice showing the wage period and the place and time of disbursement of wages shall be displayed at the place of work and a copy sent by the contractor to the principal employer under acknowledgement.

72. The principal employer shall ensure the presence of his authorised representative at the place and time of disbursement of wages by the contractor to workmen and it shall be the duty of the contractor to ensure the disbursement of wages in the presence of such authorised representative.

73. The authorised representative of the principal employer shall record under his signature a certificate at the end of the entries in the Register of Wages or the [Register of Wages-cum-Muster Roll] as the case may be, in the following form:-

"Certified that the amount shown in column No. ... has been paid to the workman concerned in my presence on at" "

It is imperative from these statutory provisions that the Petitioner, as Principal Employer, who ought to have verified that the contract labour engaged through Contractors had been paid eligible amount of wages in time, cannot shirk responsibility to find out the employees and workers concerned for remitting dues under the Act for the relevant period. As a corollary, it would



follow that the Petitioner has to ensure that those of its employees, who are not covered by the TNMSP Rules, are extended the benefits under the Act with effect from 08.01.2011 when the said Notification issued by the Central Government came into force and that the records maintained by the Contractors for the wages disbursed to the contract labour, when they were employed in the establishment of the Petitioner, would be the basis for determining the contribution of provident fund dues under the Act. There has been no effort taken by the concerned officials of the Petitioner to even perform their elementary obligation to verify the identity of the contract labour engaged through contractors and the correctness of the amount claimed by the First Respondent towards contribution of provident fund dues for them. In fact, during the previous hearing on 20.07.2021, this Court adjourned the matter to enable the Learned Counsel for the Petitioner to get instructions for withdrawal of the Writ Petition with liberty to file statutory appeal before the Appellate Authority under Section 7-I of the Act for agitating such factual disputes relating to the identification of the contract labour engaged through contractors and the amount of contribution required to be paid towards provident dues for them. When the matter is taken up for hearing today, it is informed by the Learned Counsel for the Petitioner that he has not received any instructions from the Petitioner for preferring such statutory appeal before the Appellate Authority in that regard, which would give rise to the inference that the Petitioner accepts the determination of the amount of contribution towards provident fund dues for the period from January 2011 to May 2013 in the impugned order in File No. TN/TNY/89229/Enf.I/ Circle.11/2019 dated 14.10.2019 passed by the First Respondent under Section 7-A of the Act and there is no dispute in that regard. It is, however, made clear that the Petitioner is not precluded from working out its rights against the respective contractors for reimbursement before the proper forum in the manner recognized by law.

6. It is next contended by the Learned Counsel for the Petitioner that the hasty manner in which the First Respondent has proceeded with recovery action in the consequential Order No. TN/TNY/89229/8F/Enf./Circle.11/CD-I/ 11-1/2019 dated 08.11.2019 under Section 8-F of the Act cannot be affirmed.

7. Combating such grievance sought to be ventilated by the Petitioner, it is highlighted by the Learned Counsel appearing for the First and Second Respondents that there is no bar in taking prompt and immediate action for recovery of the amounts due towards provident fund after the determination of the liability of the Petitioner under Section 7-A of the Act and on the other hand, it is the public duty cast on the First and Second Respondents to carry out such exercise. Though there is considerable force in such submission made by the Learned Counsel for the First and Second Respondents, it cannot mean that the authorities under the Act can have unlimited power to flout the prescribed procedure for recovery



infringing the safeguard provided in Article 300-A of the Constitution of India, which mandates as follows:-

"300-A. Persons not to be deprived of property save by authority of law:-

No person shall be deprived of his property save by authority of law."

It cannot be gainsaid that the right to property of a person can be taken away only by a procedure established by law, which has to be fair and reasonable and not arbitrary. At this juncture, it would be appropriate to quote the relevant passages from the decision of the Hon'ble Supreme Court of India in **Ram Kishun -vs- State of Uttar Pradesh** [(2012) 11 SCC 511], which read as follows:-

"Recovery of public dues

13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.

14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide **Lachhman Dass -vs- Jagat Ram** [(2007) 10 SCC 448] and **State of M.P. -vs- Narmada Bachao Andolan** [(2011) 7 SCC 639]. Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions."

Referring to the same, the Hon'ble Supreme Court of India in the decision in **Mathew Varghese -vs- M.Amirtha Kumar** [(2014) 5 SC 610] has held as follows:-

"43. The above principles laid down by this Court also make it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a constitutional right, as well as the human right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside."

8. In this backdrop, it requires to be noticed that while Section 8, 8-A to 8-F of the Act provides substantive provisions conferring powers for recovery of provident fund dues, the procedure for recovery has been stipulated in Section 8-G of the Act, which reads



as follows:-

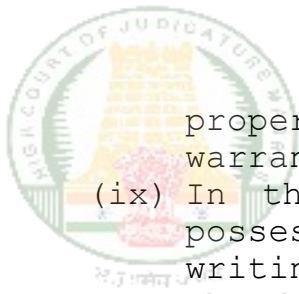
"8G. Application of certain provisions of Income-tax Act:-

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall apply with necessary modifications as if the said provisions and the rules referred to the arrears of the amount mentioned in section 8 of this Act instead of to the income-tax:

Provided that any reference in the said provisions and the rules to the "assessee" shall be construed as a reference to an employer as defined in this Act."

In the context of attachment of the bank account of the Petitioner with the Third Respondent for the recovery of the provident amount dues by the First Respondent, it would be necessary to look into Rules 2, 3, 4, 5, 8, 11, 12, 13, 20, 21, 22, 26, 28, 30 and 47 of the Second Schedule to the Income Tax Act, 1961. On a conspectus of those legal provisions, it becomes clear that the concerned authorities under the Act would have to ensure that the following requirements must be fulfilled while taking any recovery action:-

- (i) A notice would have to be served upon the defaulter to pay the specified amount within 15 days from the date of its service and intimating that in default, steps would be taken to realize that amount.
- (ii) No steps in execution shall be taken until the period of 15 days has elapsed from the date of service of the notice requiring such payment.
- (iii) However, if the defaulter is likely to conceal or remove or dispose of the whole or any part of his movable property, which would delay or obstruct the realization of the amount due, the Recovery Officer may attach the movable property by dispensing with the notice to the defaulter for reasons to be recorded in writing while passing such order.
- (iv) When a defaulter, whose property has been so attached, furnishes security to the satisfaction of the Recovery Officer, such attachment shall be cancelled from the date of acceptance of the security by the Recovery Officer.
- (v) Where any objection is made to the attachment of any property on the ground that the property is not liable to such attachment, the Recovery Officer would have to investigate into that objection on the basis of the evidence adduced by the objector in that regard.
- (vi) Where the Recovery Officer on such investigation comes to the conclusion that the property attached is not owned by the defaulter, such part of the property shall be released from the attachment made.
- (vii) A warrant of attachment signed by the Recovery Officer with his name specifying the name of the defaulter and the amount to be realized shall be served on the defaulter.
- (viii) The Recovery Officer shall proceed to attach the movable



property of the defaulter only if the amount mentioned in the warrant is not paid forthwith.

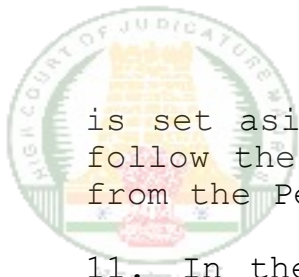
(ix) In the case of debt or other movable property not in the possession of the defaulter, the attachment has to be in writing prohibiting the creditor from recovering the debt and the debtor from making payment thereof or giving it over to the defaulter until further order from the Recovery Officer and a copy of such order shall be furnished to the defaulter and the person in possession of the debt.

(x) Where the property attached is currency notes, it shall be credited to the Central Government and the amount so credited shall be adjusted towards provident fund dues and other amounts recoverable from the defaulter and the balance, if any, remaining shall be paid to the defaulter.

It would assume significance that every stage of the recovery proceedings contemplates to afford an opportunity to the defaulter to either remit the dues or place his objection with supporting materials in that regard in consonance with the principles of natural justice before proceeding further. Such protection statutorily guaranteed to ensure the salutary object that justice is not only done, but also manifestly seen to be done, cannot be lost sight in the anxiety to complete the recovery process by the authorities under the Act.

9. The First and Second Respondents have not placed any materials before this Court to show that they have waited for a period of 15 days after calling upon the Petitioner to remit the amount due. Similarly, no order containing reasons for dispensing with such notice informing the Petitioner before attaching its bank account, has been produced. There is also nothing to show that the Petitioner was simultaneously informed of the attachment of its bank account. Such non-compliance would necessarily mean that the required opportunity to remit the dues before effecting attachment of the amount in the bank account of the Petitioner had not been granted in this case. That apart, the scheme for recovery postulates that objections could be made in respect of the attachment which would have to be investigated by the Recovery Officer. In this case, no time had been granted for raising such objections and on the other hand, the Third Respondent has been warned in the attachment order itself that if payment of the attached amount had not been made, the Third Respondent would be personally liable for payment of the arrears of provident fund that had fallen due. Such coercive methods of recovery adopted by the First Respondent is in glaring transgression of the rule of law, which cannot be countenanced.

10. The result of the foregoing discussion is that order in File No. TN/TNY/ 89229/Enf.I/Circle.11/2019 passed by the First Respondent under Section 7-A of the Act is confirmed, but the consequential order No. TN/TNY/89229/8F/ Enf./Circle.11/CD-I/II-17/2019 passed by the First Respondent under Section 8-F of the Act



is set aside and the matter is remanded to the First Respondent to follow the prescribed procedure for recovery of provident fund dues from the Petitioner as explicated in this order.

11. In the upshot, the Writ Petition is disposed on the aforesaid terms. Consequently, the connected Miscellaneous Petitions are closed. No costs.

Sd/-

Assistant Registrar (AE)

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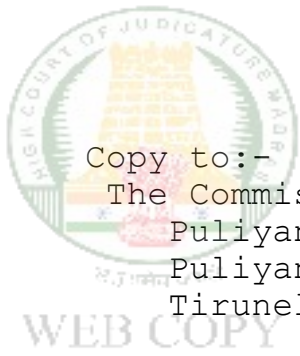
Sub Assistant Registrar(CS)

sm/vjt

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1. The Regional Provident Fund Commissioner - II,
Employees' Provident Fund Organisation,
Bhavishya Nidhi Bhavan,
NGO-B Colony, Perumal Puram Post,
Tirunelveli - 627 007.
2. The Enforcement Officer,
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5. The Additional Chief Secretary to Government of Tamil Nadu,
Municipal Administration and Water Supply Department,
Secretariat, Fort St. George, Chennai - 600 009.



Copy to:-
The Commissioner,
Puliyangudi Municipality,
Puliyangudi - 627 855,
Tirunelveli District.

+1 CC to M/s.M.RAJARAJAN, Advocate (SR-24515[F] dated 29/07/2021)

+1 CC to M/s.K.MURALISHANKAR, Advocate (SR-24353[F] dated 29/07/2021)

W.P. (MD) No. 24832 of 2019
28.07.2021

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